

LEE HOOI HUA

v.

TEOW ENG CHUAN

HIGH COURT MALAYA, ALOR SETAR

LIM BENG CHOON J

[CIVIL SUIT NO. 177 OF 1979]

17 MAY 1987

CONTRACT: *Contract of tenancy - Termination - Applicability of Control of Rent Act 1966 - Sections 4, 16, 17 - Evidence Act - Section 92 - Law of Contract - Transfer of Land and Premises - Sub-letting.*

The action was originally brought by Loh Jin Hoe s/o Loh Soon Hin. The original plaintiff died and his grandson Lee Hooi Hua was substituted as the plaintiff in his capacity as the personal representative of the deceased. At the onset of the trial, both Counsels for the respective parties agreed that the writ and the accompanying statement of claim should be amended and it was allowed by Court. The statement of defence was also amended to enable the defendant to answer to the amended pleadings of the plaintiffs.

The averments of the plaintiff were as follows:

- (a) in consideration of a sum of RM5,000 which the deceased had paid to and received by the defendant, the latter executed a statutory declaration on 30 September 1954 stating that the deceased was entitled to one half share of the two houses nos. 45 and 46, Pekan Pendang, Pendang Kedah;
- (b) by the deed of dissolution of partnership dated 1 July 1971 the defendant agreed that the deceased was to have the ownership of house No. 46;
- (c) by a tenancy agreement entered into by the two parties concerned on 4 July 1971 it was agreed that the defendant entered into occupation of the house no. 46 as a tenant on payment of a monthly rental of RM60 inclusive of the ground rent of RM12 per month.
- (d) as the defendant failed to carry out his obligations to transfer the ownership of house no. 46, the deceased through his solicitors sent a notice on the 21 May 1979 to the defendant, demanding his compliance with the said deed of dissolution. However the defendant did nothing;
- (e) another letter was sent through the solicitors on 28 June 1979 demanding that the defendant quit and give vacant possession of the house to the deceased. The notice was received by the defendant;
- (f) alternatively, the plaintiff contended that the defendant held that house in trust for the plaintiff;
- (g) inspite of repeated demands to quit the defendant failed, refused or neglected so to do.

The defendant among other things contended that the house no. 46 was a controlled building pursuant to the Control of Rent Act 1966. The plaintiff led the evidence of S, a chartered valuer attached to a well-known firm of valuers. S in his evidence stated that based on a

- a* building plan reference number with which approval was sought by the defendant the house had been built in 1952. The plaintiff also led evidence to establish that house no. 46 had been let out by the defendant to a company.

The case for the defence was as follows:

- b* (a) the sum of RM5,000 paid by the deceased was merely a loan to help out the defendant in carrying out major repairs to the houses and not as purchase price of one half share of the two premises and
- (b) the premises in question was as single tenement although there were two numbers allocated to the premises by the then town board and
- c* (c) the house no.46 was a controlled building under the Control of Rent Act 1966 and he claimed the protection awarded by the said Act. The defendant also claimed that the identity of the original house had not been changed inspite of the renovations carried out sometime in 1952-1953.

- d* The plaintiff sought in this action for a declaration that by the deed of dissolution the plaintiff had been vested with a beneficial interest in house no. 46 and the incidental orders for vacant possession, arrears of rental, mesne profits and the usual order for injunction to restrain the defendant or his representatives from dealing with premises no. 45 and 46.

Held:

- e* [1] The argument of the defence counsel that since the status of the plaintiff as executor of the estate of the deceased was not proved his claim was unsustainable was to be rejected as the application for substitution was allowed by consent of both parties.
- f* [2] The plaintiff need not point out the specific passages in the bundle of documents he was relying on. The documents had been tendered in evidence by the consent of both parties. The defendant had not seriously disputed the authenticity of the documents and indeed some of them had been relied on by the defendant. In any event the plaintiff had in his pleadings indicated he would rely on the tenancy agreement and the deed of dissolution to support his claim.
- g* [3] The Court can scrutinise the contents of all the documents in order to determine the issue in dispute.
- h* [4] It was trite law that a contract for the sale and purchase of land let alone a house was valid and enforceable in Malaysia even without being reduced to or evidenced in writing. A simple contract of sale and purchase of immovable property can be formed in the same manner as any other type of contract. There was no doubt that there existed an agreement albeit an oral one between the defendant and the deceased whereby there was an offer and an acceptance made between the parties leading to the payment of a sum of RM5,000 as consideration in support of the agreement to transfer one half share of the ownership of the said two premises and the parties agreed to create a legally binding agreement between themselves *vis-a-vis* the two houses.
- i* [5] The terms of the oral agreement were clearly reflected in the statutory declaration made by the defendant on 30 September 1954. If the defendant wished to take advantage of the rule which allowed extrinsic oral agreements to be admitted to give full effect to the intention of the parties, even though there may be a written agreement incorporating much of the terms and obligations of the parties, he should have first proved their admissibility on the balance of probability before they could be admitted under s. 92 of the Evidence Act 1950. This he had failed to do.

[6] The deceased and the defendant had entered into a valid contract whereby the deceased had acquired an equitable right of ownership of the house no. 46. In the result the deceased would at least be entitled to an action for specific performance to compel the defendant to perform his part of the bargain *ex contractu*. It is well settled law that the equitable right that accrued to a deceased, upon his death desolved upon the personal representative of his estate. The plaintiff was entitled to the declaration prayed for.

a

[7] The Control of Rent Act did not apply to buildings completed after 31 January 1948. Although the general rule is that the onus of proof is on the landlord who disclaims that a building was completed on or before a certain date, the rigidity of this general rule is diminished when both parties chose to put in evidence, in their endeavours to establish that the building in question was or was not a controlled building. Accordingly as both parties in the present case have adduced evidence on this matter the onus of proof is not of paramount importance and the totality of the evidence must be considered to arrive at a correct decision.

b**c**

[8] The proper test to be applied in the present context was “the degree of charge effected” due to the renovations in and around 1952. In evaluating the evidence of the valuer who should be treated as an expert witness it can be concluded that the houses were completed sometime in 1952-53 and that they were one building. The witness however had no personal knowledge as to when the houses were completed nor the extent of the renovations. Consequently on an evaluation of all the evidence it was clear that the original house was built prior to 1948, but the work that was carried out in 1952 and 1953 were to all intents and purposes a complete restructuring resulting in the transformation of a single house to two separate self-contained houses under a common roof. The restructuring had satisfied the judicial tests used to ascertain the creation of a new entity. The houses nos. 45 and 46 were completed some time in 1952-1953 and the provisions of the Control of Rent Act were not applicable to the tenancy of house No.46.

d**e**

[9] The defendant has failed to pay monthly rental in respect of house no. 46 since July 1978 and the plaintiff was entitled to invoke cl. 4 of the tenancy agreement and recover possession of the said premises. The plaintiff is also entitled to the reliefs he had prayed for in paras. 2 and 3 of p. 17 of his amended statement of claim.

f

[10] In any event, even though the premises were not completed sometime in 1952-53 and were controlled premises the plaintiff was entitled to apply to Court under s. 16(1)(a) of the Control of Rent Act 1966 for an order for the recovery of possession of the house. The defendant had taken no step at all to tender the arrears of rent at any time and hence the deceased had a right to terminate the tenancy and demand for vacant possession of the house no. 46 in terms of the aforesaid section. Upon the death of the deceased the plaintiff had the right to sue for vacant possession. All that the plaintiff needed to do was to apply to Court for an order under s. 16(1)(a) and although no specific application had been made, it was covered by para. 10 of his amended statement of claims and in any event the defendant was not taken by surprise.

g

[11] There was no evidence that the defendant had sub-let the premises to the company. In any event the defendant had ceased to be a tenant by 1 August 1979 when he failed to pay arrears on or before 31 July 1979. As he had ceased to be a contractual tenant and was holding over by virtue of s. 16(1) he had no right to grant a valid sub-tenancy to a third person.

h**i**

a Cases referred to:

Goh Gook Hoon v. Abdul Hamid & Anor. [1967] 1 MLJ 36
The State of Johore v. Tan Ah Boon [1934] MLJ 142
Kersah La'usin v. Sikin Menan [1966] 2 MLJ 20
Government of State of Penang & Anor. v. B.H. Oon & Ors. [1971] 2 MLJ 235
Yong Chiang v. Bong Tjhin Oi [1973] 2 MLJ 136
Krishnan Sreedhara Panicka v. Chiam Soh Yong Realty Co. Ltd. [1976] 1 MLJ 224

b

Reg v. Murphy [1980] 1 QB 434
Dato Mokhtar b. Hashim v. PP [1983] 2 MLJ 232
Rex Sidmouth Rent Tribunal ex parte Qollect [1951] 1 KB 578
United fire and General Insurance Co. Ltd. v. Jaffnese Co-operative Society Ltd. [1971] 1 MLJ 118
Soong Ah Chow & Anor. v. Lai Kok Cheng [1986] 1 MLJ 46
Ng Eng Hian v. Koh Geok Noi [1965] 1 MLJ 230
Wong Miew Choong v. Loh Fatt [1961] 1 MLJ 219

c

Oversea-Chinese Banking Corporation v. Philip Wee Kee Puan [1984] 2 MLJ 1

Legislation referred to:

Control of Rent Act 1966, ss. 4(2)(a), 16(1), (1)(a), (1)(i)(1)(m), (2), (3), 17(1)
 Evidence Act 1950, s. 92

Other source referred to:

d

Sarkar on Evidence, 13th Edn., p. 515
 For the plaintiff - *George John; M/s.George John & Co.*
 For the defendant - *E. Mayandi; M/s.Mayandi & Panjaram*

JUDGMENT

e Lim Beng Choon J:

This action was originally brought by one Loh Jin Hoe s/o Loh Soon Hin on 22 August 1979 in which he sought for certain declaratory orders and incidental orders which were consequential thereto. It is not necessary to adumbrate the reliefs which the original plaintiff had prayed for as he had died before the trial of this case and in the result certain amendments were made to the endorsement in the writ and also the accompanying statement of claim when the deceased plaintiff's grandson, Lee Hooi Hua was substituted as the plaintiff in this action in his capacity as the personal representative of the deceased. The order for substitution was made by this Court on 1 December 1980 with the consent of both parties after Lee Hooi Hua had obtained a grant of probate as executor of the estate of the original plaintiff who died on 24 April 1980 (hereinafter referred to as "the deceased").

f

On 14 December 1981, the plaintiff amended the indorsements in the writ and the accompanying statement of claim pursuant to a consent order of this Court. In the result, the reliefs sought by the plaintiff were confirmed to a declaratory order that by a deed of dissolution of partnership executed by the defendant and the deceased on 1 July 1971 (hereinafter referred to as "the deed of dissolution") the plaintiff has been vested with a beneficial interest in the house known as no. 46 Pekan Pendang, Pendang, Kedah and the incidental orders for vacant possession, arrears of rental, mesne profits and the usual order for injunction to restrain the defendant, his agents and servants from entering into any dealings whatsoever of the premises nos. 45 and 46, Pekan Pendang, Pendang, Kedah.

h

At the onset of the trial, both the Counsel for the respective parties agreed that the capacity of Lee Hooi Hua to continue the action as the plaintiff was not sufficiently described in the Writ and the accompanying statement of claim. The Counsel for the plaintiff therefore made an oral application to amend the Writ and the said statement of claim to correct the defect. The Counsel for the defendant raised no objection to the amendment sought and by consent

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this Court allowed the application for the amendments. The statement of defence was also amended to enable the defendant to answer to the amended pleadings of the plaintiff. As the parties were ready to proceed with the trial notwithstanding the new amendments made to the pleadings of both parties, I therefore proceeded with the hearing of the case. So much for the interlocutory proceedings to correct the defect in the pleadings.

a

Reverting to the substantive matters in issue, it is appropriate that I should start with the averments of the plaintiff as contained in his amended statement of claim (see pp. 14 to 18 of the bundle of pleadings) and they can be briefly stated as follows:

b

- (1) in consideration of a sum of RM5,000 which the deceased had paid to and received by the defendant, the latter executed a statutory declaration on 30 September 1954 stating that the deceased was entitled to one half share of the two houses nos. 45 and 46, Pekan Pendang, Pendang Kedah.
- (2) by the deed of dissolution of partnership dated 1 July 1971 the defendant agreed that the deceased was to have the ownership of the house no. 46 Pekan Pendang, Pendang, Kedah.
- (3) by a tenancy agreement entered into by the two parties concerned on 4 July 1971 it was agreed that the defendant entered into occupation of the houses no. 46 as a tenant on payment of a monthly rental of RM60 inclusive of the ground rent of RM12 per month.
- (4) as the defendant failed to carry out his obligations to transfer the ownership of the house no. 46, the deceased instructed his solicitors to send a notice to the defendant which they did on 21 May 1979 to demand his compliance with the terms of the said deed of dissolution. But the defendant ignored the notice and did nothing.
- (5) later the deceased again instructed the solicitors to give notice which they did on 28 June 1979 demanding the defendant to quit and to give vacant possession of the house no. 46 to the deceased which notice was received by the defendant.
- (6) alternatively, the plaintiff contended that the defendant was at all material times holding house No. 46 in trust for the plaintiff.
- (7) In spite of repeated demands to quit the defendant failed, refused or neglected to do so.

*c**d**e**f*

The evidence of the plaintiff himself was rather scanty. This is no doubt due to the fact that all the transactions relevant to this case were carried out by the deceased and the defendant and it was the deceased who instituted the present action in the first place. Upon the death of the deceased on 24 April 1980 the plaintiff had to take over and continue with the action. He therefore had to rely on the documents as contained in the agreed bundle of documents (Exhibit "A") to elicit the necessary evidence in support of his case. Be that as it may, he did in his evidence in chief say that his grandfather (the deceased) had "an interest" in the house no. 46 and that he did instruct his solicitors to issue the notice to quit (see p. 9 of Exhibit "A") to the defendant and that the latter did receive the said notice since he had acknowledged receipt of the same in the AR card tendered as P1. The plaintiff therefore prayed for repossession of house no. 46, damages and costs. Under cross-examination, he admitted there was no central partition between the houses nos. 45 and 46 although there was a wooden partition at the front portion of the two premises. The major part of his evidence both in chief and under cross-examination was directed towards establishing the fact that the defendant had sub-leased both the premises to Bahan Binaan Pendang Sdn. Bhd. in defiance of the interim injunction issued by the Court on 23 February 1980.

*g**h**i*

- a* However in order to controvert the defendant's contention that the house no. 46 was a controlled building pursuant to the Control of Rent Act 1966 the plaintiff brought before in one, Mr. Teoh Leong Seng, PW2, to establish that the said house was not built and completed on or before 31 January 1948 and hence under s. 4(2)(a) of the 1966 Act the said house was not a controlled building. In his evidence PW2 said that he was a chartered valuer attached to M/s C.H. Williams, Talhar and Wong, a well-known firm of chartered valuers. Some time
- b* in 1983 he was engaged by the plaintiff to carry out an investigation regarding the date of the completion of the houses nos. 45 and 46. The purpose of his investigation was to see whether the construction of the houses nos. 45 and 46 were completed on or before 31 January 1948. He was given a building plan reference number with which approval was sought by the defendant from the then Town Board Kota Star for the construction of the said houses. The said building plan reference number was no doubt obtained from the following part of
- c* the statutory declaration made by the defendant on 30 September 1954 (see p. 1 of the agreed bundle of documents Exhibit "A") which reads:

that the two houses bearing Nos: 45 and 46, Pekan Pendang, standing on Lot No.2575, Pendang vide approved **Plan in TBKS No. 1B/435/72**, ... (Emphasis is mine)

- d* PW2 then went to the Pendang District Office and also the present Majlis Perbandaran, Kota Setar to make a search for the pertinent file relating to the approval given by the relevant authority for the construction of the said houses. But unfortunately the said file could not be found. However from his knowledge and experience as a chartered valuer he was able to decipher the reference number of the said building plan since as he said he had seen many building plans. In his deciphering the reference TBKS. IB/435/72 he explained to this Court that TBKS meant the then Town Board Kota Setar and the letters IB meant one building.
- e* The number 435 was the department reference of the then Town Board Kota Setar and that the last figure 72 meant the year in which the said building plan was submitted for approval by the then Town Board Kota Setar. He went on to say that the year 72 meant the Muslim calendar year and not indicative of the Gregorian calendar year. Hence the figure '72' was indicative of the calendar year 1372 which is equivalent to the Gregorian calendar year 1952. From his deduction he was certain that the premises were built sometime between the
- f* Gregorian calendar year 1952 and 1953. PW2 also took a photograph of the premises which was tendered as the plaintiff's exhibit and marked as P2 after he had produced the negative, P2N. The remaining evidence of the case for the plaintiff adduced from PW3 and PW4 concerned the letting out of the house no. 46 by the defendant to the company Bahan Binaan Pendang Sdn. Bhd. (hereinafter referred to as "the company") and that the company paid to the defendant a sum of RM4,136 as yearly rental of the house inclusive of ground rent. The
- g* evidence relating to the letting out of the premises no. 46 to the company is of some significance as can be seen presently. Suffice for me to say here that in "letting out" the said premises to the said company (and I used the words letting out guardingly because as can be seen presently it is doubtful whether the defendant did in fact sublease the premises to the company) the defendant deliberately disobeyed the consent order of interim injunction granted by this Court on 27 February 1980 which restrained the defendant, his agents or
- h* servants from selling, leasing, charging or in any manner whatsoever dealing with the house nos. 45 and 46.

As regards to the case for the defence, it is to be noted that the defendant averred in para. 3 of his amendment statement of defence that:

3. As to pp. 3, 4 and 5 of the statement of claim the defendant avers as follows:

- i* (a) The said premises no. 45 and 46 (hereinafter referred to as "the said premises") Pekan Pendang, originally belonged to the defendant's father.

- (b) As it was old and in the need of repairs, the defendant applied to repair the same. *a*
- (c) As the defendant did not have sufficient funds, the defendant borrowed RM5,000 from Loh Geen Hoe, deceased for the purpose of carrying out major repairs to the said premises.
- (d) The said premises although they are numbered as 45 and 46 are actually one and not divisible. *b*
- (e) The defendant on account of having taken the said loan of RM5,000 executed a statutory declaration that the said Loh Geen Hoe, deceased was entitled to ½ share in the said premises nos. 45 and 46, Pekan Pendang, Kedah.

It is clear from the averments that the defence is relying on two grounds to resist the claims of the plaintiff namely: (i) the sum of RM5,000 paid by the deceased was merely a loan to help out the defendant in carrying out the major repairs to the said houses and not as purchase price of one half share of the two premises and (ii) the premises in question comprised of a single tenement although there were two numbers allocated to the premises by the then Town Board Kota Setar. Another significant averment in the defence can be found in para. 5 of the amended statement of defence where the defendant averred that although he admitted that he was put into occupation of the house the terms and conditions as set out in the tenancy agreement dated 4 July 1971 (hereinafter referred to as the “tenancy agreement”) which both parties agreed that due to a typographical error the numbering of the premises should read “no. 46” and not “no. 45”, nevertheless he asserted that the house no. 46 was a controlled building under the Control of Rent Act 1966 and he claimed the protection awarded by the said Act. *c*

Turning to the evidence of the defendant himself, he started off by saying that when he first entered into business in 1949 he conducted his business from a house (hereinafter referred to as “the original house”) which was erected on the same plot of land where the premises nos. 45 and 46 now stand. At that time the original house had not been allotted with any Town Board number. However, the original house was subsequently allotted the nos. 45 and 46 by the Town Board when they started to impose assessments on the premises. He admitted that the original house required renovations and that he needed money for the renovations. But he did not say anything at all as regards to his averment about getting a loan from the deceased to enable him to carry out the renovations; neither did he lead any evidence to show the terms with which the sum of RM5,000 was loaned by the deceased to him. In his evidence he also did not dispute the authenticity or the truth of the contents of the statutory declaration dated 30 September 1954 and the deed of dissolution of Partnership dated 1 July 1971 (hereinafter referred to as “the statutory declaration and the deed of dissolution” respectively). He merely glossed over the documentary evidence by saying that when the deed of dissolution was executed there was an understanding that the house No.46 was to be transferred to him but there was “no agreement”. However, he admitted that when the partnership was dissolved he entered into a tenancy agreement with the deceased in respect of “one of the premises”. To support his averment that the premises in dispute was the same as the original house he said that the two premises were in fact comprised of only one single tenement and there never were two tenements although the Town Board did allocate two consecutive numbers to the premises when the Town Board began to assess the rateable value of the premises for purposes of calculating the rates of assessment. He paid the ground rents and he produced the ground rental receipts in respect of the diverse dates from the year 1950 till 1981 when he made the payments. He also produced receipts to show that he paid assessments to the then Town Board in respect of the two premises (see Exhibits D3AF). *d*

*a**b**c**d**e**f**g**h**i*

- a* These receipts clearly show that separate assessment rates were levied on house no. 45 and house no. 46 respectively. Under cross-examination, he said that when the company paid rentals to him for both the houses he tried to give the rental of the house no. 46 to the plaintiff who refused to accept it. When asked by the learned Counsel for the plaintiff why did he agree to allow the deceased to have house no. 46, his response was that the lawyer who handled the matter asked the parties to draw lots in order to resolve the question as to
- b* who should be the respective owners of the houses nos. 45 and 46. To support his contention that the deceased had no right of ownership of house no. 46, he went on to say that at the time of the execution of the deed of dissolution of partnership, the deceased had agreed to sell house no. 46 to him in the sum of RM5,000. However by the end of 1971 the deceased was already paralysed and his daughter and grandchildren refused to honour the agreement and so he continued to pay rental at RM48 per month. Pausing for a moment to review the
- c* evidence of the defendant it is clear that what he said is not true. If the deceased had agreed to sell house no. 46 to him at RM5,000 at the time when the deed of dissolution of partnership was made there is no earthly reason for the two parties to execute the tenancy agreement. The rest of his evidence is directed to defend himself against his contravention of a covenant in the tenancy agreement prohibiting him from assigning, subletting, or parting with the possession of the house no. 46 and his conduct evincing a deliberate defiance of
- d* the consent order issued by this Court restraining him, his agents and servants from any dealings in respect of house no. 45 and 46 as adumbrated above. The defendant also called two witnesses to try to establish that the premises in dispute were substantially the same as the original house. In short, so the defendant claimed, the identity of the original house had not been changed notwithstanding the renovations carried out sometime in 1952-1953.
- e* The first issue which I have to determine is whether the deceased had a right in law of the ownership of house no. 46. The learned defence Counsel in his submission on this point contended (if I understand him correctly) that firstly the right of the plaintiff in his claim for vacant possession of the said house was merely based on an equitable right and until the right was clothed with something more he had no legal right of the ownership of the said house. The second argument raised by the learned defence Counsel was that since the status
- f* of the plaintiff as executor of the estate of the deceased was not proved his claim was unsustainable meaning I suppose that he had no *locus standi* to continue with the action, The third argument of the learned defence Counsel was that since the plaintiff was relying on the documentary evidence he should point out "the specific passage(s) in the documents" in the agreed bundle, Exhibit "A", with which he was relying on to substantiate his claim and that a mere assertion that he based his claim on the documents in Exhibit "A" was insufficient. I shall firstly deal with the second point as I think, with respect to the learned
- g* defence Counsel, such contention is best stated and be rejected for the simple reason that in the interlocutory proceedings the plaintiff had applied to substitute his name as executor of the estate of the deceased after he had obtained an order of the grant of probate made by this Court and the application for substitution was allowed by consent of both parties. I cannot therefore see any logic in such contention. Turning to the third argument of the learned
- h* defence Counsel, I am also of the view, with due respect to the learned defence Counsel, that the argument is equally without any merit simply because all the documents in the agreed bundle of documents had already been tendered as evidence in this Court by the consent of both parties and admitted as Exhibit "A". More importantly, the defendant did not seriously dispute the authenticity and the contents of the deed of dissolution and the tenancy agreement with which the plaintiff relied strongly in support of his claims. Indeed the
- i* defendant in his testimony referred to the deed of dissolution in his attempt to urge this Court that notwithstanding that it was agreed by the parties in the said deed that the deceased

should have the ownership of house no.46, nevertheless, there was an oral agreement whereby the deceased agreed to sell the said house to the defendant at RM5,000. As regards to the tenancy agreement the defendant in his evidence admitted both the authenticity and the contents of the document. In respect of the statutory declaration the defendant hardly raised any objection to its authenticity. Besides, the plaintiff did in his pleadings clearly state that he would refer to the terms of the deed of dissolution at the trial and also that he would rely on the terms of the tenancy agreement to support his claim. In such a situation, I can see no reason for requiring the plaintiff to point out the precise passages or parts in the respective documents upon which he had clearly said even before the trial that he would be relying to support his claim; this Court can certainly scrutinise the contents of all the documents in order to determine the issue in dispute - see *Goh Gook Hoon v. Abdul Hamid & Anor.* [1967] 1 MLJ 36 at 37. The only argument of the learned defence counsel that requires serious consideration is therefore the first one in which he contended that as the deceased's right over premises no. 46 rested in equity and nothing else, the deceased had therefore no legal right of ownership of the said premises. On this point it is trite law that a contract for the sale and purchase of land let alone a house is valid and enforceable in Malaysia even without being reduced to or evidenced in writing. In short a simple contract of sale and purchase of immovable property can be formed in the same manner as any other types of contract. All that is required is the existence of the basic elements of a binding contract namely:

- (i) an offer and an acceptance;
- (ii) the agreement must be supported by consideration; and
- (iii) the terms of the agreement are spelt out sufficiently to constitute a legally binding agreement between the said parties.

Reverting to the present case I have no doubt at all and I do find as a fact that there was in existence in agreement albeit an oral one made between the defendant and the deceased whereby there was an offer and an acceptance made between the parties leading to the payment of a sum of RM5,000 (which sum constituted one half of the prices of the two houses numbering 45 and 44) by the deceased to the defendant as consideration in support of the latter agreeing to transfer one half share of the ownership of the said two premises to the former and the parties intended by the said agreement to create a legally binding relationship between them *vis-a-vis* the two said houses. The terms of the oral agreement were clearly reflected in the statutory declaration made by the defendant on 30 September 1954. It is interesting to note that the defendant did not in his evidence deny that the statutory declaration was made by him; indeed he did not say even a single word about the statutory declaration although he conceded that the ownership of the house no. 46 was given to the deceased by virtue of the deed of dissolution. In answer to the plaintiff's case, the defendant averred in his amended statement of defence certain allegations which I have earlier reproduced. Notwithstanding the positive averment by the defendant that the sum of RM5,000 given by the deceased was merely a loan and nothing more, yet the defendant in his testimony had failed to lead any evidence to establish his allegations apart from saying that some time in 1952 he intended to renovate the original house and he needed money to carry out "major repairs" to the original house.

In formulating the positive averments in the said para. 3 of the amended statement of defence, I would expect the defendant to have in his possession some evidence which he could adduce at the trial to back up such averments which would then enable him to take advantage of the rule which allows extrinsic oral agreements to be admitted to give full effect to the obligations of the parties even though there may be a written agreement incorporating much

- a* of the terms and obligations of the parties. But the admissibility of extrinsic oral evidence must be proved albeit on the balance of probability before it can be admitted under s. 92 of the Evidence Act 1950 to establish the existence of such extrinsic oral agreement. In the absence of any such proof, it is futile for the defendant to expect this Court to accept what he averred in his amended statement of defence as established facts when they were backed up only with evidence which at its best is hopelessly tenuous. What
- b* is more fundamental is that if I were to concede to his argument on this point I would not only be accepting mere averments which were not supported by evidence as established facts but I would be leading judicial countenance and approval to the defendant's culpability of deliberately making a false statutory declaration which needless to say I should not and could not do.
- c* At any rate the existence of the aforesaid agreement to transfer one half share of the ownership of the two houses numbering 45 and 46 is reinforced by the terms contained in the deed of dissolution dated 1 July 1971. Under that deed it was clearly stated that "the continuing partner" (meaning the defendant), shall purchase from the retiring partner (meaning the deceased) for the sum of RM16,000 the share and interests of the retiring partner in the assets and effects of the retiring partner (see para. (a) and also para. (b) of the third recital of the said deed at p. 2 of the agreed bundle of documents Exhibit "A"). In addition it was
- d* stated in para. (c) of the said recital that "the Retiring Partner shall be entitled to the house known as no. 46 Pekan Pendang, Pendang, Kedah ...". If the deceased had not purchased one half share of the two houses there is in my view no reason at all for the defendant to give up the ownership of the house no. 46 so tamely after having agreed to purchase "the share and interests of the retiring partner" in the sum of RM16,000.
- e* From the evidence I therefore find as a fact that the deceased and the defendant had entered into a valid contract whereby the deceased had acquired an equitable right of ownership of the house no. 46. In the result the deceased would at least be entitled to an action for specific performance to compel the defendant to perform his part of the bargain *ex contractu*. This proposition finds support from the following observations of Thorne J in his judgment which was concurred by Huggard CJ and Gerthy J in the case of *The State of Johore v. Tan Ah Boon* [1934] MLJ 142 at 151:
- f*
- g* It would appear that the right of the purchaser under the system of conveyancing in which registration of title obtains is somewhat analogous to that of the *Roman Fides Commisum*, so that the purchaser who has paid the whole of his purchase price has no estate, properly so called, in the land agreed to be purchased, but has rights which rest in contract, and which may or may not, according to the circumstances of the particular case, entitle him to sue and to invoke the equitable principle of specific performance. To state the matter in another way, the purchaser has no rights in *rem* but has only right *in personam* against the vendor. It is necessary for the purpose of the present case to decide whether the plaintiff here is in the same position as a purchaser under a contract of purchase of land from a registered proprietor, but assuming for the sake of argument that the present plaintiff should be regarded as in the opinion of this Court that his rights are still merely contractual and that the relief to which he would be entitled is such relief, if any, as the Court administering equitable relief under the
- h* Specific Relief Enactment would accord to him.
- The observation was considered and approved by Raja Azlan Shah J (as His Highness then was) in the case of *Kersah La'usin v. Sikin Menan* [1966] 2 MLJ 20 at p. 22. No doubt the two cases which I have cited concern a contract of a sale and purchase of land but I cannot see why the proposition cannot apply with equal force in the transactions carried out between
- i* the deceased and the defendant in the present case. It is equally well settled in law that the

equitable right accrued to the deceased would upon his death devolve upon the personal representative of his estate as expounded in the *Kersah La'usin* case where it is stated at p. 22H (*ibid*):

The only remaining question is: what happens to the contract *in fieri* when the purchaser dies seven months after the date of contract? Does that right under the contract devolve on his personal representative: In *Haji Osman's* case *supra*, Pretheroe Ag CJ remarked at p. 38:

As death does not avoid a contract of this nature it seems clear that the same principles apply where a proprietor dies and his representative becomes the registered proprietor. As such he can, in my opinion, be compelled to take all steps necessary to give effect to the contract executed by the deceased proprietor.

On principle and authority I therefore hold that the plaintiff is entitled to the declaration as prayed for in para. 1 of p. 3 of his amended statement of claim. However that is not the end of the matter since the defendant chose to reply on the contention that the house nos. 45 and 46 were controlled buildings under the Control of Rent Act 1966 and he claimed the protections awarded by the said Act to the tenancy of the house no. 46. On this issue it is important at the outset to note that pursuant to s. 4(2)(a) the provisions of the Act would not apply to "buildings completed after 31 January 1948". At the trial a great deal of arguments had been generated by both parties on the question of whether the disputed premises were completed on or before 31 January 1948 thereby bringing them within the provisions of the Act.

In considering this issue, it is important for me to bear in mind the general rule which states that the onus of proof is on a landlord who disclaims that a building was completed on or before the specified date. However the rigidity of this general rule is diminished when both parties choose (as happened in the present case) to put in evidence in their endeavours to establish that the building in question was or was not a controlled building. Thus in *Government of State of Penang & Anor. v. B.H. Oon & Ors.* [1971] 2 MLJ 235 at 237 the Privy Council held:

Their Lordships do not find it necessary to express a view on the question of onus. That question would be relevant in a case where there was no evidence... or where the evidence was so evenly balanced that there is no preponderance of probability.

In the present case there is evidence adduced by both parties bearing on the question whether the premises in dispute were completed before or after 31 January 1948. The question of onus of proof is not therefore of paramount importance as it is incumbent on me to consider the total evidence in order to be able to arrive at a correct decision.

Having disposed of the question of onus, the next matter to consider is the correct judicial test that should be applied in determining whether the disputed premises were or were not completed before the specified date. On this point I am able to find some useful guidance from the case of *Yong Chiang v. Bong Tjhin Oi* [1973] 2 MLJ 136. There Suffian FJ (as he then was) after an exhaustive review of several Privy Council, Malaysian and Singapore authorities, said at p. 140:

That test, as stated by the Acting Chief Justice of Hongkong and approved by the Privy Council, is this: where the damage has been so extensive, so that there is nothing left which could possibly be called a building, then the existence of that building as a building is terminated and a building replacing it would be an entirely new building though it was built on the same foundations and had the same floor.

- a** In *Krishnan Sreedhara Panicka v. Chiam Soh Yong Realty Co. Ltd.* [1976] 1 MLJ 224 the view of Raja Azlan Shah FJ (as His Highness then was) regarding the proper test to apply is explained in greater clarity at p. 230.

It seems to me, on principle and authority that whatever the case may be, be it a case of self-induced repairs and renovations or extensions or damage and repairs, or rebuilding the test is the same - the degree of change effected.

- b** The test enunciated in both these authorities was considered and approved by Lee Hoe CJ (Borneo) in *Krishnan Sreedhara Panicka v. Chaim Soh Yong Realty Co. Ltd.* [1983] 1 MLJ 65.

- c** Applying the aforesaid test to the two houses in the present case it is to be noted that I have the evidence of PW2 who as a chartered valuer would no doubt have the necessary skill, knowledge and experience to decipher the building plan reference TBKS. IB/435/72 and in deciphering the building plan reference in the manner as I have stated earlier he had arrived at the conclusion that the houses nos. 45 and 46 were completed some time in 1952-1953. Furthermore he also said that the letters IB was indicative of the construction of one building. I must, however, mention that the learned defence counsel contended that the conclusion of this witness is not worth a penny as it was purely hearsay. In the face of such contention,
- d** I must first of all consider the question of the admissibility of the evidence of this witness and secondly the weight I should give to his evidence. On these points. PW2 was, as I have said, a chartered valuer working for the well known firm of William, Talhar & Wong and no doubt he was in possession of the necessary knowledge, skill and experience in understanding building plans. Indeed he said that in his profession as a chartered valuer he had "seen a lot of building plans." In the result I have no hesitation in accepting him as an expert in the interpretation of building plants. This proposition finds support from the following passage appearing at p. 515 of *Sarkar on Evidence* 13th Edn.:
- e**

The instances in which the witness' opinion is excluded by this principle are roughly classed into two groups. First, all witnesses whether testifying on observed data of their own or on data furnished by others, may state their inferences so far only as they have some special skill which can be applied to interpret or draw inferences from these data.

- f** Again in the case of *Reg. v. Murphy* [1980] 1 QB 434 the English Court of Appeal held that it was not wrong for the Crown Court to admit the evidence of a police constable who gave an opinion as an expert witness concerning the nature of a collision between the vehicles. The headnote of the reported case has this to say:

- g** ... that a police constable was entitled to be heard on every aspect as an expert so long as he kept within his reasonable expertise.

- h** This observation was considered and approved by the Federal Court in *Dato Mokhtar b. Hashim v. PP* [1983] 2 MLJ 232. In view of these authorities, it is therefore legitimate for me to regard PW2 as an expert witness in his interpretation of the building plan reference TBKS. IB/435/72 which is certainly within the sphere of his expertise. That much his evidence which I have taken into account must be considered along with the other evidence adduced in this Court regarding this issue. However that may be, I must warn myself that PW2 did not have personal knowledge as to when the houses nos. 45 and 46 were actually completed; neither was he able to say what were the extent of the renovations which was carried out in respect of the original house.

- i** After a careful scrutiny and assessment of the evidence, my findings on this issue are as follows. The defendant commenced to embark into a business venture in 1949. Some two years later he went into partnership with the deceased trading under the name of Eng Hup

Hoe & Co. and the firm was engaged in the timber and hardware business (see the second recital of the deed of dissolution at p. 2 of the agreed bundle Exhibit "A"). The place of the firm business was at the original house. In saying this, I am fully aware that in the said second recital it is stated that the firm name of Eng Hup Hoe and Co. was at no. 45/46, Pekan Pendang ...” It is however my considered opinion that the place of business of the partnership firm said to be at no. 45/46 in the deed of dissolution was inserted therein in order to give a correct description of the place of business of the partnership firm in 1971; the place of business as asserted in the said deed could not, from the evidence taken as a whole be indicative of the fact that in 1951 when the partnership was formed the firm business was carried at the houses nos. 45 and 46. The nature of the business carried by the firm obviously called for much more space. Hence some time in 1952 it was decided to reconstruct the original house in order to provide more space for the type of business carried out by the partnership firm. This is clearly indicated by the building plan bearing the reference TBKS No. IB/435/72 submitted to the then Town Board Kota Star for permission to build a single building (as stated by PW2). The works of reconstruction must be very radical as after the completion of the reconstruction works the original house of a single accommodation characteristic was transformed into the present premises comprising of two tenements albeit housed under a common roof. The two tenements of the present premises must be self-contained as the then Town Board of Kota Setar thought it fit to impose separate assessment in respect of each of the tenement. Furthermore if the two tenements were not self-contained, there would be pointless for the deceased to accept the ownership of house no. 46 and the defendant to keep house no. 45 for himself and agreeing to accept the tenancy of house no. 46 to carry on his business. Moreover, it can be seen from the photograph, P2, taken by PW2, that Bahan Binaan Pendang Sdn. Bhd. which was said to have taken over the sublease of the present premises was in fact occupying only the house no. 46. It is therefore obvious that the defendant was and still occupying house no. 45. Indeed the defendant in his evidence admitted this fact. In further support of the proposition that the reconstruction works carried out in respect of the original house was very radical, I take note of the fact that the total costs of the works were within the region of RM10,000 which to my mind is a considerable sum of money considering that the value of a dollar in 1952 would be equivalent to about at least five times the value of a ringgit in 1980. From the above discussions I am also satisfied that the cubic capacity of the present premises with two tenements would be very much greater than the cubic capacity of the original house. This proposition is consistent with the facts that (i) the nature of business of the firm required much more space, (ii) the then Town Board Kota Star imposition of separate assessment rates for the two tenements, and (iii) the Bahan Binaan Sdn. Bhd. was able to carry out its business at a house no. 46 while the defendant continued to occupy house no. 45. The fact that the defendant chose to make a statutory declaration on 30 September 1954 referred to above also clearly shows that the present premises with the two tenements were completed sometime in 1952 or 1953. In the ultimate analysis the works that were carried out were not merely “major works or renovation” in the nature of accessorial additions or alterations of merely localised effect to the original house but they were to all intents and purposes a complete reconstruction resulting in the transformation of a single house to two separate self-contained houses under a common roof. In carrying such a radical transformation it is inevitable that substantial structural alterations of the original house had to be made. In the result the original house had lost its identity and in its place a completely new entity had been created namely the present premises comprising of two tenements. In the circumstances I have no hesitation in holding that the works that had been carried in reconstructing the old house satisfy the test enunciated in the two cases of *Yong Chiang v. Bong Tjhin Oi* and *Krishnan Sreedhara Panick v. Chiam*

- a* *Soh Yong Realty Co.* cited above. Reference may also be made to the following observation (*albeit obiter*) of Lord Goddard CJ in his judgment in *Rex Sidmouth Rent Tribunal ex parte Sellect* [1951] 1 KB 778 at 782:

- b* Such conversion may not be a mere matter of structural alteration or improvement it may be in some cases ... that an entirely new entity had been created and such a new entity ... could be created notwithstanding that the original four walls of the house remained. The interior of an old fashioned house with perhaps three or four storeys could be completely taken over as if it had been gutted by fire and the whole place would be not only reconstructed but rebuilt inside so that what remained after the alteration was not a converted house but a block of four flats which were entirely self-contained.

- c* This observation applies equally well to the present premises with the two tenements numbering 45 and 46. I therefore hold that the houses nos. 45 and 46 were completed some time in 1952-1953 and the provisions of the Control of Rent Act 1966 are not applicable to the tenancy of house no. 46. As the defendant had failed to pay the monthly rental in respect of the house no. 46 since July 1978 and the plaintiff is entitled to invoke clause 4 of the Tenancy Agreement which reads:

- d* 4. Provided that if the rental shall be in arrears for one month after becoming payable or the tenant shall discontinue his tenancy of the said shop house without giving three months notice of determination of tenancy then this agreement shall be treated as null and void and of no further effect, and the owner shall have the right to re-enter upon the said shop house and take repossession thereof.

- e* and to recover possession of the said premises particularly when the deceased through his then solicitors had 28 June 1979 by letter demanded payment of the arrears of rent on or before 31 July 1979 failing which the defendant was told to quit and to deliver the vacant possession of the said premises to the deceased (see p. 9 of the agreed bundle Exhibit "A") I must, however, mention that the learned Defence Counsel contended that the question of arrears of rent could not arise as there was no evidence of nonpayment of rent by the defendant. This I cannot agree as I am of the view that there is more than sufficient evidence to show that the defendant was and still is in arrears of rent since July 1978 as can be seen presently. I therefore hold that the plaintiff is also entitled to the reliefs for which he prayed
- f* in paras. 2 and 3 of p. 17 of his amended statement of claim.

- g* In arriving at the aforesaid findings I have also not lost sight of the evidence of the two witnesses called by the defendant to testify on his behalf on this issue. The first witness DW2 did say that he had bought some building materials from the defendant at the original house where the latter was carrying on his business in 1949. His business dealing with the defendant was only on that one occasion when he bought the building materials and he never went to that house prior to 1948 or even after that one occasion when he purchased the building materials. However that may be, he did also say that the original house was there "before the 2nd World War." But when he was cross-examined by the Counsel for the plaintiff, he admitted that he did not know what had happened to that house in 1952-1953 although he had earlier said in examination-in-chief that "the shop is still there today." It is quite obvious that the evidence of this witness is of very little assistance to the defence as he was not able to say anything about the renovations that were carried out in respect of the original house. Furthermore the houses which he saw in 1949 must have undergone far-reaching structural changes view of the extensive reconstruction made to it as stated above. As to the second witness, DW3, his evidence is equally of no assistance to the defence as he clearly admitted that he migrated to Pendang three years "after the Japanese had
- h*
- i*

surrendered” and that he had some business dealings with the defendant only in the year 1949. In the result, the evidence of the two witnesses is hopelessly inadequate to rebut the contention that the disputed premises were completed some time between 1952 and 1953.

Even if I am wrong in my conclusion that the premises in dispute were completed some time in 1952-1953, and that the premises are controlled buildings pursuant to the Control of Rent Act 1966, nevertheless I am of the view that the plaintiff is entitled to apply to this Court under s. 16(1)(a) of the Control of Rent Act 1966 for an order for the recovery of possession of the house no.46. Before I proceed to give my reasons for my arrival at such a conclusion, it is necessary at the outset to identify the nature and the scope of the protections awarded by the Act. In this connection it is to be noted that the concept of statutory tenancy as provided in Part V of the Control of Rent Ordinance 1956, had been abolished when the 1956 Ordinance was repealed and replaced by the 1966 Act. In the result, the tenant of a controlled building can now hold over only by virtue of s. 16(1) of the 1966 Act. This proposition was first expounded by the Federal Court in *United Fire and General Insurance Co. Ltd. v. Jaffnese Co-operative Society Ltd.* [1971] 1 MLJ 118. There the Federal Court had to determine whether a subtenant was protected from ejectment under the 1966 Act when it was granted a subtenancy by the chief tenant of the premises when the latter itself after the termination of its contractual tenancy was holding over by virtue of s. 16(1) of the 1966 Act. In holding that the said Act had no provisions to enable the head tenant to transmit his own privilege of irremovability to a third party, the Federal Court went on to say:

In the first place there is no longer any such creature as the “statutory tenant” after January 1, 1967. It will be noted that all reference to “statutory tenants” contained in Part V, s. 20 and 21, of the 1956 Ordinance and in the definition of “tenant” have been deleted from the 1966 Act. There remains only one relic of him from the past namely that under subsection (3) of s. 17 the sub-tenant who is irremovable by virtue of the provisions of s. 17 continues to enjoy the same personal, non-transferable privilege of occupation as the statutory tenant formerly did by virtue of the provisions of s. 19(2) of the 1956 Ordinance. Here, the appellants base their sub-tenancy of the ground floor on a grant by the “statutory tenant” of the bank, after the 1966 Act had abolished statutory tenancies. Under this Act the bank enjoyed simply the protection afforded to it under s. 16(1).

(per judgment of Ong CJ (as he then was) at p. 122 *ibid*). In a more recent case of *Soong Ah Chow & Anor. v. Lai Koh Cheng* [1986] 1 MLJ 46 Hashim Yeop Sani FJ explained the nature and scope of the protections awarded to controlled premises under the 1966 Act in greater clarity when His Lordship said:

Thus *United India Fire & General Insurance Co. Ltd. v. Jaffnese Co-operative Society Ltd.* should be read in its proper context. In our view, that case merely emphasis the abolition of “statutory tenancies” by the Control of Rent Act, 1966 and that a tenant can now hold over only by virtue of s. 16(1) of the Act.

In short, the gist of the contention canvassed by the appellants is simply as follows. Even though the Control of Rent Act 1966 has done away with statutory tenancies the Act still protects tenants in the situation of the appellants. In our view, however, the protection under the 1966 Act against eviction of a tenant is contained in the provisions of s. 16 of the Act; and the protection against unfair increase of rentals is contained in s. 4-11 of the Act. The Act confers no other protection to the tenant.

In the present case it is clear that firstly the deceased had through his solicitors gave notice on 28 June 1979 (see p. 9 of Exhibit “A”) demanding vacant possession of the house no. 46 on the ground that the defendant was in arrears of rent since the month of July 1978 and he was given until 31 July 1979 to quit and give up vacant possession of the said house.

- a** That the deceased had a right to demand vacant possession of the said house should the defendant commit a breach of the term of the tenancy agreement relating to the payment of rent cannot be disputed in view of the clear term in cl. 4 of the tenancy agreement - see *Ng Eng Hian v. Koh Geok Noi* [1965] 1 MLJ 230 at 233 C-E (right hand column) also *Wong Miew Choong v. Loh Fatt* [1961] 1 MLJ 219. Although the defendant did receive the said notice (see "P1") he blatantly ignored it. Moreover in his evidence he did not deny that he
- b** had incurred the said arrears of rent as mentioned in the said notice. No doubt the defendant did say in his evidence that when he gave rental to the plaintiff, the latter refused to accept. But this statement was made in the course of the cross-examination of the defendant which clearly shows that he attempted (if at all) to make payment of the monthly rent to the plaintiff he did soonly after he had been receiving rent from the company and not the arrears of rent referred to in the said notice to quit. This is obvious from the following passage in the notes
- c** of evidence when under pressure of cross-examination he made the said statement:
- Q: You occupied premises no. 45 and the office of the company occupies no. 46, why (did you) collect rentals for both premises?
- A: These premises are registered under my name. So the company paid rentals for both premises. When I gave the rental to the plaintiff he refused to accept it.
- d** Q: Did the plaintiff tell you why he refused to accept the rental?
- A: He said he wanted back the premises.
- Q: Did he not also tell you that by Court order you could not lease it to somebody?
- A: I did not lease it out to anyone. I am a director of company and doing business there
- e** From the tenor of the cross-examination, I am impelled to hold that if the defendant did try to pay the monthly rental of house no. 46 he did so only after he had rented it to the said company some time 1981. I arrived at this conclusion not only from the tenor of the cross-examination but also from my observation that the defendant did not say anything in his evidence that he did pay or try to pay the arrears of rent to the deceased upon the receipt of the said notice. Had he really made a tender of the arrears of rent after he had received
- f** the said notice one would have expected him to say at the very least that he did and that the deceased had refused to accept the arrears of rent; alternatively he could have replied to the solicitors who sent him the said notice explaining that he was not in arrears of the specified rentals. In the absence of any evidence to rebut the said notice I can do more than to hold that the defendant had taken no step at all to tender the arrears of rent at any time and hence the deceased had a right to terminate the tenancy and demand for vacant
- g** possession of the house no. 46 pursuant to s. 16(1)(a) of the Control of Rent Act 1966. Upon the death of the deceased the right which had accrued to him devolved to his estate and the plaintiff as the executor of his estate had the same right to sue for vacant possession. The only remaining act which the plaintiff had to do was to apply to this Court for an order pursuant to s. 16(1)(a) of the 1966 Act which he did by virtue of this action. It is true that the plaintiff has not specifically pleaded his right to rely on s. 16(1) of the said Act in support
- h** of his case. But it is my considered opinion that this allegation is sufficiently covered by para. 10 of his amended statement of claim. At any rate this allocation has been satisfactorily presented and developed at the trial and there are sufficient materials on the record from which I can make a decision. Furthermore as one of the objects of modern pleadings is to prevent surprise I cannot for one moment think that the defendant in the present case was taken by surprise - see *Oversea Chinese Banking Corporation v. Philip Wee Kee Puan* [1984] 2 MLJ 1. In the circumstances I am satisfied that the plaintiff is entitled to an order
- i** prayed for in subparagraph 3 of para. 14 of his statement of claim even assuming that the

house no. 46 is a controlled building under the 1966 Act. In arriving at my conclusion, I have not overlooked the provisions of s. 16(1)(m) and s. 16(3) of the said Act. In the circumstances of this case I can see no good reason to apply the provisions of the aforesaid sections to the present case as the defendant does have the alternative accommodation namely the house no. 45 available for his use. Furthermore the defendant has acted most unreasonably in depriving the plaintiff from his right to possession of house no. 46. The decisions which I have reached as stated above are sufficient to dispose of this case.

The next matter which I should consider is a contention raised by the learned Counsel for the plaintiff in his submission. He contended that since the defendant had rented the premises no. 46 to Bahan Binaan Pendang Sdn. Bhd. in breach of cl. 2(4) of the tenancy agreement, the plaintiff could rely on para. (i) of s. 16(1) of the Control of Rent Act 1966 to recover possession of the said premises. The said cl. 2(4) reads as follows:

2. The tenant covenants with the owner as follows:

(1)

(2)

(3)

(4) Not to assign, sub-let or part with possession of the said shophouse without the consent of the owner.

I am afraid that I cannot entertain his contention simply because this allegation was not pleaded at all in the plaintiff's amendment statement of claim neither was an application made to amend the same to add in this allegation. More importantly, however, is that there is no evidence that the plaintiff did sublet the said premises to the said company. At the most what has been established is that the plaintiff has granted a licence to the company to occupy the said premises and to carry on its business there on payment of a certain sum of money yearly. The defendant himself was and I believe still is a director of the said company who has a hand in managing the business of the said company. In the consequence, sub-section (2) of s. 16 of the Control of Rent Act 1966 would come into play and even had the plaintiff pleaded his right to recover possession of the said premises pursuant to para. (i) of s. 16(1) of the said Act, he might not succeed in view of the said sub-section (2) of s. 16. In any case the defendant had ceased to be a tenant by 1 August 1979 when he failed to pay the arrears of rent on or before 31 July 1979. As he had ceased to be a contractual tenant and was holding over only by virtue of s. 16(1) of the said Act he had no right to grant a valid subtenancy to a third person - see *United India Fire & General Insurance* case (*supra*).

Be that as it may, I must say that in view of the defendant's blatant disobedience of the order of interim injunction issued by this Court as stated earlier, there is nothing to prevent the plaintiff from moving this Court for committal proceedings against the defendant for his contempt of Court regardless of the verdict made by this Court in respect of this action.

Furthermore in his capacity as a director of the company who has notice of the order of interim injunction, the defendant is fixed with the liability for the breach by the company of the said injunction - see *Datuk Hong Kim Sui v. Tin Shi Kian & Chan Jin Hong* Privy Council Appeal No. 23 of 1985 (un-reported).

It is appropriate at this stage to make some comments regarding the conduct of the defendant. Apart from his deliberate defiance of the injunction as stated above, I have no hesitation in saying that he is certainly an unreliable witness. His evidence is a compilation of lies and half-truths. For instance when he was asked in examination-in-chief whether the two premises

a had any partition he said there was no partition “at the beginning” and it was only recently a partition was put up. Again he was very persistent in saying that he did not receive any rental from the company and that although he did sign a voucher which was for a sum of RM4,136 and which PW4 said was in respect of rentals for the premises, nevertheless he kept on saying that he signed the voucher blindly without any knowledge of the contents of the voucher. However under the pressure of cross-examination he admitted that he did receive

b rental from the company in the sum of RM3,000 plus per annum since 1981. The most apparent lie which he put up in his evidence relates to the order of interim injunction issued by this Court. When Counsel for the plaintiff put to him that he wilfully refused to comply with this Court order of injunction he refused to say anything. On the direction of this Court, the question was put to him a second time yet he was still evasive and would not give a direct answer. He was then asked whether he was present in the Judge’s chambers on 23 February

c 1980 when the application for interim injunction was heard. His answer was that he could not remember notwithstanding that the order of this Court contains these words “defendant being present.” The above are only a few instances of the dissatisfactory manner in which the defendant gave his testimony. There are in fact much more discrepancies in his own evidence. For the above reasons, it follows that judgment will have to be entered for the plaintiff as follows:

- d*
- 1) the granting of a declaratory order as prayed for,
 - 2) that the defendant is hereby ordered to execute a valid and registrable transfer of the house no. 46, Pekan Pendang, Pendang, Cheetah in the name of the plaintiff,
 - 3) that the defendant and all persons claiming through the defendant do within the three months from the date of his order quit and gave up vacant possession of the house
- e*
- no. 46 Pekan Pendang, Pendang, Cheetah to the plaintiff
 - 4) that the defendant do pay to the plaintiff arrears of rental from the month of July 1978 at the rate of RM48 per month until the month of July 1979 and thereafter mesne profits at the rate doubles the said monthly rental until the plaintiff obtains vacant possession of the said house.
- f*
- 5) the interim injunction issued by this Court on 27 February 1980 be made final
 - 6) costs of this proceeding to be paid by the defendant to the plaintiff.

g Assuming that the premises no. 46 is a controlled building under the Control of Rent Act 1966 (which I am not prepared to accede for the reasons as stated earlier) the orders I have made must still stand notwithstanding s. 17(1) of the Control of Rent Act 1966 simply because as I have said earlier there is insufficient evidence to establish that the defendant has subleased the premises in dispute to Bahan Binaan Pendang Sdn. Bhd. In short, the said company is not a lawful subtenant of the defendant in respect of the premises in dispute. Consequently the provisions of s. 17(1) of the said Act are not applicable.

h Also found at [1988] 2 CLJ 203

i